No. 99-166

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WEBSTER L. HUBBELL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

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INTEREST OF THE UNITED STATES DEPARTMENT OF JUSTICE

This prosecution is being conducted by an Independent Counsel pursuant to the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.*; see 28 U.S.C. 594(a)(9) (authorizing independent counsel to conduct prosecutions "in the name of the United States"). The Ethics in Government Act of 1978 provides that "[n]othing in [the Act] shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding." 28 U.S.C. 597(b). The question presented in this case, which involves the effect of a grant of act-of-production immunity pursuant to 18 U.S.C. 6002 and 6003, can be expected to arise in prosecutions conducted by

the United States Department of Justice. The Department therefore has a substantial interest in the resolution of the issue of law presented in this case.

STATEMENT

1. On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit responsible for appointing independent counsels under the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.*, appointed an independent counsel and gave him authority to investigate matters that have generally been called "Whitewater." Pet. App. 2a-4a. On September 1, 1994, the Independent Counsel requested and received authorization from the Special Division under 28 U.S.C. 594(e) to investigate as well whether respondent Webster L. Hubbell had committed any criminal offenses "in his billing or expense practices while a member of the Rose Law Firm." Pet. App. 116a. Respondent subsequently pleaded guilty to two counts of mail fraud and tax evasion arising out of that referral and was sentenced to 21 months' imprisonment. *Id.* at 4a, 116a.

On November 1, 1996, while respondent remained incarcerated, the Independent Counsel served him with a subpoena in connection with grand jury proceedings in the United States District Court for the Eastern District of Arkansas. Pet. App. 24a, 128a; J.A. 46-53. The subpoena required production of all of respondent's business, financial, and tax records from January 1, 1993, until the date of the subpoena. *Id.* at 128a; see *id.* at 24a-25a n.12. Respondent refused to produce the documents, invoking his Fifth Amendment privilege against compelled self-incrimination. *Id.* at 25a-26a, 128a. The Independent Counsel obtained an order under 18 U.S.C. 6002 and 6003 compelling the production of documents and granting respondent immunity from incrimination "to the extent allowed by law." Pet. App. 26a, 128a; J.A. 60-61.[1] Respondent then produced 13,120 pages of documents to the Independent Counsel. Pet. App. 26a, 128a. Respondent also appeared before the grand jury and confirmed that he had produced all of the documents in his possession or control that were responsive to the 11 specifications of the subpoena. *Id.* at 26a; J.A. 62-70.

2. On January 6, 1998, the Special Division referred the following matter concerning respondent to the Independent Counsel:

> (i) whether [respondent] or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding [respondent's] income since January 1, 1994, and his tax and other debts to the United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and
>
> (ii) whether [respondent] or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that [respon-

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[1] Pursuant to 18 U.S.C. 6003(a), a district court may issue "an order requiring [an] individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." When such an order is issued, "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. 6002. This Court has held that "the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." *Kastigar* v. *United States*, 406 U.S. 441, 462 (1972).

dent] has received from various individuals and entities since January 1, 1994.

Pet. App. 5a, 117a; J.A. 71-72.

On April 30, 1998, a grand jury sitting in the United States District Court for the District of Columbia returned a ten-count indictment against respondent; his wife, Suzanna Hubbell; his accountant, Michael Schaufele; and his tax lawyer, Charles Owen. Pet. App. 5a, 26a-27a, 117a. The indictment charged the defendants with conspiracy, in violation of 18 U.S.C. 371; impeding and impairing the Internal Revenue Service, in violation of 26 U.S.C. 7212(a); tax evasion, in violation of 26 U.S.C. 7201; aiding the preparation of a false income tax return, in violation of 26 U.S.C. 7206(2); and four counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343. Pet. App. 26a-27a. The tax and fraud counts alleged a scheme to avoid paying taxes that respondent had agreed to pay as part of his 1994 guilty plea, as well as taxes on income that respondent had received after leaving the Department of Justice in 1994. *Id.* at 27a-28a, 117a. In developing the evidence of the offenses for which respondent was indicted, the Independent Counsel concededly used the contents of the documents acquired pursuant to subpoena. See *id.* at 26a, 113a-114a, 128a.

3. Respondent moved to dismiss the indictment. He argued, *inter alia*, that the Independent Counsel's use of documents acquired from respondent pursuant to subpoena violated respondent's rights under the Fifth Amendment. The district court upheld respondent's Fifth Amendment claim and granted the motion to dismiss. Pet. App. 113a-143a.[2]

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[2] Respondent and his co-defendants also argued that the Special Division had no authority to make the January 6, 1998, referral to the Independent Counsel without the concurrence of the Attorney General. The district court agreed, Pet. App. 123a-127a, but the court of appeals reversed, *id.* at 2a-22a. Respondent has not sought further review of that ruling.

The court acknowledged that "the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege." Pet. App. 131a. The court added, however, that the "act of production" even of unprivileged documents may have "testimonial aspects." *Id.* at 132a (citing *Fisher* v. *United States*, 425 U.S. 391, 410-411 (1976), and *United States* v. *Doe*, 465 U.S. 605, 612-613 (1984)). The court stated that "[t]he testimonial aspects of the act of production are: (1) that documents exist; (2) that the person producing them possessed them; and (3) that they are authentic." Pet. App. 132a. It concluded that respondent's compliance with the subpoena constituted "testimony" within the meaning of the Fifth Amendment because it revealed the existence of documents of which the Independent Counsel had previously been unaware. *Id.* at 133a-134a. Because the Independent Counsel conceded that it had "used the contents of these documents to identify and develop evidence that led to this prosecution," *id.* at 128a, the court held that respondent's Fifth Amendment rights had been violated and granted the motion to dismiss the indictment, *id.* at 133a-137a.

4. The court of appeals vacated the district court's judgment and remanded the case for further proceedings under a legal standard that presupposes that the contents of subpoenaed records may be regarded as tainted fruit of the subpoena recipient's implicit acknowledgment that the records exist. Pet. App. 1a-112a.

a. The court of appeals acknowledged that "the Fifth Amendment does not protect the contents of pre-existing, voluntarily prepared documents." Pet. App. 31a. The court of appeals also noted, however, that "[w]hile the contents of preexisting documents are not protected, the [Supreme] Court has acknowledged that there are testimonial and

potentially incriminating communications inherent in the act of responding to a subpoena which may themselves be protected by the Fifth Amendment." *Ibid.* The court described those communications as follows:

> the act of production communicates at least four different statements. It testifies to the fact that: i) documents responsive to a given subpoena exist; ii) they are in the possession or control of the subpoenaed party; iii) the documents provided in response to the subpoena are authentic; and iv) the responding party believes that the documents produced are those described in the subpoena.

Id. at 32a. The court then turned to whether respondent's act of production had "testimonial value" and whether any such implicit testimony had the potential for "incrimination." *Id.* at 35a.

The court of appeals observed that, while not every act of production communicates sufficient information to be deemed "testimonial" within the meaning of the Fifth Amendment, Pet. App. 37a, a particular act of production will have implicit testimonial aspects unless the government can establish that it knew, before the subpoena was issued, "of the existence, possession, and authenticity of subpoenaed documents with 'reasonable particularity.'" *Id.* at 59a. The court of appeals held that "[o]n remand, the district court should hold a hearing in which it seeks to establish the extent and detail of the government's knowledge of [respondent's] financial affairs (or of the paperwork documenting it) on the day the subpoena issued," to determine whether the "reasonable particularity" test was met. *Id.* at 61a. The court of appeals also stated that, while it appeared that respondent faced both direct and indirect incrimination from the act of production, it would leave to the district court on remand the determination whether any testimonial component of respondent's act of production was incriminating. *Id.* at 62a-65a.

b. The court of appeals then addressed the question whether the grant of immunity to respondent pursuant to 18 U.S.C. 6002 and 6003 precluded the Independent Counsel from using the contents of the documents produced in response to the subpoena. The Department of Justice, appearing as amicus curiae, argued that because voluntarily prepared documents are not protected by the Fifth Amendment privilege, they provide an independent source for any information contained within the documents themselves. Under that approach, the government remains free to use the contents of subpoenaed documents, even in situations where the act of production has a meaningful testimonial component, so long as "the government does not mention the mechanics through which it obtained those documents, and [so long as] the documents are sufficiently self-explanatory and self-referential to establish their own nexus with the defendant." Pet. App. 67a.[3]

The court of appeals rejected that approach, because it "obviated the need for prior knowledge that the documents actually exist." Pet. App. 67a. It held instead that "[o]nce the documents appear and are examined, such that their existence enters the consciousness of the prosecutor, the United States has offered no means through which the government can establish that its evidence 'is not directly or *indirectly* derived from such testimony' as to their existence." *Id.* at 68a (quoting *United States* v. *North*, 920 F.2d

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[3] As the court of appeals explained, the Department of Justice "invite[d] the court to compare what the government learns from the act of production with what it would know if the documents in question just appeared on its doorstep. That intellectual exercise, [the Department] argue[d], separates the information conveyed through the act of production with what could be deciphered from the records themselves." Pet. App. 66a.

940, 946 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991)). The court of appeals concluded that

> [i]f the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party.

Pet. App. 71a.

c. Judge Williams dissented from the court of appeals' disposition of respondent's Fifth Amendment claim. Pet. App. 100a-112a. Judge Williams first observed that in the present case, the Independent Counsel had not sought to use respondent's act of production either to show respondent's prior possession of the records or to establish their authenticity. *Id.* at 104a-105a. He also rejected the majority's conclusion that the documents themselves were the tainted fruit of respondent's implicit admission of "the existence of the papers *demanded*." *Id.* at 105a (quoting *Fisher*, 425 U.S. at 410) (emphasis added in Judge Williams's opinion). Judge Williams explained:

> If the government could refer back to the subpoena to identify documents and to clarify relationships that were not clear on their face or by other independent means, then it would be using a testimonial component of the transaction—the witness's implicit statement that the documents match the subpoena's description. [Respondent's] claim for blanket exclusion of the contents, by contrast, relies on existence in a quite different sense—the fact that these particular pieces of paper are in being. But this is quite easily confirmed by these papers' own physical presence, which is "self-evident" at the time and place of production and so long thereafter as the government maintains proper custody.

Pet. App. 105a. Consistent with the submission of the Department of Justice, Judge Williams concluded that "[s]ensibly construed, the act of production doctrine shields the witness from the use of any information (resulting from the subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked." *Id.* at 111a. That test, he observed, would protect against exploitation of "any testimonial aspect of the act of production." *Ibid.*

SUMMARY OF ARGUMENT

A. In a variety of circumstances, this Court has held that the government may compel a suspect to perform a physical act, even where the result of the act is that the government acquires incriminating evidence. The Court has applied that principle to the production of documents, holding that an individual may not resist a subpoena on the ground that the contents of the requested documents are likely to incriminate him. Although the Fifth Amendment protects the individual against the compelled, incriminating disclosure of "the contents of his own mind," *Doe* v. *United States*, 487 U.S. 201, 211 (1988), the privilege does not extend to thoughts and understandings that have been voluntarily committed to writing. When an individual elects to create a written record of his mental impressions, the resulting document is a physical object that can be acquired and used by the government according to the same rules that generally govern the acquisition and use of physical evidence.

B. Although the Fifth Amendment privilege does not extend to the contents of voluntarily created documents, an individual's compliance with a subpoena may have the practical effect of providing the government with incriminating information that cannot be gleaned from examination of the records themselves. And because the act of production may reveal thoughts and understandings that have not voluntarily been committed to writing, their compelled

disclosure raises Fifth Amendment concerns. An individual may therefore have a valid Fifth Amendment objection to a document subpoena, notwithstanding the unprivileged character of the documents themselves. This Court has held that by granting use immunity under 18 U.S.C. 6002 and 6003, prosecutorial officials can obtain and use the contents of potentially incriminating documents, while protecting a subpoena recipient against self-incrimination by any admissions that might be implicit in the act of production.

C. The question in a case in which act-of-production immunity has been granted is to determine what uses—direct and indirect—of any implicit testimonial communication are precluded by the grant of immunity. The court of appeals' approach views uses of the *contents* of the produced documents as tainted by the act of production in every case in which the government lacks reasonably particular knowledge of the documents' existence and their possession by the subpoena recipient before production is made. That approach comes close to reviving the doctrinal consequences of *Boyd* v. *United States*, 116 U.S. 616 (1886), under which the Fifth Amendment protected against the production of private papers based on their incriminating contents. The correct approach requires distinguishing between uses (and derivative uses) of the unprivileged physical act of production, and uses (and derivative uses) of the immunized testimonial aspects of the act of production.

The government's use of the contents of subpoenaed documents is not derived from any testimonial component of the subpoena recipient's act of production. Rather, the contents are obtained through the act of production *qua* physical act. As the dissenting judge in the court of appeals explained, the consequence of use immunity is to "shield[] the witness from the use of any information (resulting from the subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked." Pet. App. 111a. The standard

espoused by the dissenting judge—*i.e.*, that the government may examine and use the contents of subpoenaed documents so long as it does so without reference to the implicit testimonial aspects of their production—fully protects a subpoena recipient's Fifth Amendment rights while permitting the government to acquire and use pre-existing physical evidence.

Contrary to the court of appeals' holding, the government's acquisition and use of documents under act of production immunity is not the tainted fruit of an implicit admission that the produced documents exist. Any such admission would have no independent testimonial significance, since it would communicate no information distinct from the contents of the (unprivileged) documents themselves. The government gains access to those contents as a result of the physical act of production, not by virtue of any admissions implicit in that act. And, unless the government must (or does) elucidate the meaning of the documents by reference to testimonial aspects of the act of production, there is no improper exploitation of those testimonial aspects.

D. In any event, both the existence and a subpoena recipient's possession of the sorts of routine financial records demanded in this case would generally be a "foregone conclusion," *Fisher* v. *United States*, 425 U.S. 391, 411 (1976), at the time the subpoena was issued. The court of appeals thus erred by requiring highly specific knowledge of particular papers. An implicit admission of possession of ordinary financial documents does not rise to the level of a testimonial communication under the Fifth Amendment. *Ibid.*

ARGUMENT

A GRANT OF ACT-OF-PRODUCTION IMMUNITY DOES NOT BAR THE GOVERNMENT FROM USING THE CONTENTS OF VOLUNTARILY PREPARED DOCUMENTS THAT IT OBTAINS BY COMPELLING COMPLIANCE WITH A GRAND JURY SUBPOENA

An individual's compliance with a subpoena for documents—his "act of production"—entails two basic consequences. First, the act of production effects a physical transfer of pre-existing physical evidence, bringing the documents within the dominion and control of the government and thereby allowing the government to examine their contents. So long as the documents were voluntarily created, that transfer of possession does not, in and of itself, involve any form of compelled testimony. Second, an individual's obligation to produce the documents described in a subpoena may as a practical matter implicitly require him to communicate information that cannot be gleaned from inspection of the documents themselves. The individual's production tacitly admits, for example, that responsive documents exist, were within his control at the time the subpoena was issued, and are thought to be authentic. Because those implied admissions were not voluntarily committed to writing, an order effectively compelling their disclosure raises Fifth Amendment concerns.

Under 18 U.S.C. 6002 and 6003, an individual may be compelled to give testimony, notwithstanding his claim of Fifth Amendment privilege, subject to the condition that neither the testimony, nor any information directly or indirectly derived from that testimony, may be used against him in any criminal case. This Court has squarely held that the immunity granted by Section 6002 "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* v. *United States*, 406 U.S. 441, 453

(1972). This Court has also specifically approved use immunity under Sections 6002 and 6003 as a method by which the government can obtain and use the contents of voluntarily created documents—which are not themselves protected by the Fifth Amendment privilege—while ensuring that a subpoena recipient is not incriminated by any admissions that might be implicit in the act of production. See *United States* v. *Doe*, 465 U.S. 605, 614-617 (1984) (*Doe I*).

The analysis of the court of appeals—which treats the *contents* of the subpoenaed records as presumptively derived from the testimonial aspects of a subpoena recipient's act of production—effectively subverts this Court's unequivocal holdings that the Fifth Amendment does not protect the contents of voluntarily created documents. The court of appeals' analysis is also untenable on its own terms. The government's possession of subpoenaed documents, and its consequent ability to make investigative and evidentiary use of their contents, is the result of the purely physical aspects of respondent's act of production, not the fruit of any compelled *testimony*.

A. Compelled Disclosure Of Pre-Existing, Voluntarily Created Documents Is Not, In And Of Itself, A Form Of Compelled Testimony

1. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The protections of the Amendment thus come into play only when there is the confluence of compulsion, testimonial communication, and incrimination. See *Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Where the compulsion does not produce testimonial communication, but instead requires a physical act, a suspect may be "compelled" to assist the government in the investigation of crime.

The Court has applied that principle in many contexts. For example, an individual may be compelled to furnish a

blood sample, *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966); to provide a handwriting exemplar, *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967), or a voice exemplar, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); to stand in a lineup, *United States* v. *Wade*, 388 U.S. 218, 221-223 (1967); or to wear particular clothing, *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910). "These decisions are grounded on the proposition that 'the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" *Doe* v. *United States*, 487 U.S. 201, 210 (1988) (*Doe II*) (quoting *Schmerber*, 384 U.S. at 761). "It is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause." *Doe II*, 487 U.S. at 211 (citations and internal quotation marks omitted); see *id.* at 213 (privilege against compelled self-incrimination serves "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government"); accord *Pennsylvania* v. *Muniz*, 496 U.S. 582, 595 n.9 (1990) ("nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another").

2. In *Boyd* v. *United States*, 116 U.S. 616 (1886), this Court held that the introduction into evidence of incriminating private papers that the defendant was compelled to produce violated the Fifth Amendment. The Court explained that it was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633. Under *Boyd*, the Fifth Amendment protected against the compelled production of private papers where the *contents* of those papers were incriminating.

The Fifth Amendment analysis in *Boyd*, however, "ha[s] not stood the test of time." *Fisher*, 425 U.S. at 407. In *Fisher* and in *Doe I*, this Court held that the Fifth Amendment provides no protection for the contents of voluntarily prepared documents, even when those documents are acquired by the government through subpoena over the owner's objection. As the Court observed in *Braswell* v. *United States*, 487 U.S. 99, 109 (1988), "the holding in *Fisher*—later reaffirmed in *Doe [I]*—embarked upon a new course of Fifth Amendment analysis."

The Court in *Fisher* explained that the Fifth Amendment privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications." 425 U.S. at 409. Because the documents at issue in *Fisher* had been created voluntarily, the Court held that "they cannot be said to contain compelled testimonial evidence." *Id.* at 409-410; see *id.* at 409 (a subpoena for documents does not "compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought"). The Court further observed that an individual "cannot avoid compliance with [a] subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.* at 410. In *Doe I*, the Court reiterated that "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." 465 U.S. at 612 n.10; see *id.* at 610 ("[w]here the preparation of business records is voluntary, no compulsion is present"); *id.* at 618 (O'Connor, J., concurring) ("the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind").

The thrust of *Fisher* and *Doe I* is that an individual's Fifth Amendment right to avoid compelled disclosure of "the contents of his own mind" extends only to thoughts and understandings that the individual has chosen not to ex-

press. When an individual voluntarily reduces his mental impressions to writing, the resulting document is a physical object that can be acquired and used by the government according to the same rules that generally govern the acquisition and use of physical evidence.[4] So long as the document is created voluntarily, neither the government's assertion of physical dominion over the object, nor the government's subsequent use of its contents for investigative or evidentiary purposes, raises any Fifth Amendment concern. As this Court recognized in *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 555 (1990), *Fisher* and *Doe I* establish that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded."

B. The Act Of Production Has Testimonial Significance Only Insofar As It Implicitly Communicates Information That Has Not Voluntarily Been Reduced To Writing

Although the Fifth Amendment privilege does not extend to the contents of voluntarily created documents, an individual's compliance with a subpoena may have the practical effect of providing the government with incriminating information "wholly aside from the contents of the papers produced." *Fisher*, 425 U.S. at 410. An individual who produces documents in compliance with a subpoena

[4] In *Andresen* v. *Maryland*, 427 U.S. 463, 471-473 (1976), the Court applied a similar analysis in rejecting the petitioner's contention, based on *Boyd*, that the seizure pursuant to warrant of his "personal business records" violated the Fifth Amendment. The Court found that the element of compulsion was lacking because "petitioner was not asked to say or do anything. The records seized contained statements that petitioner had voluntarily committed to writing." *Id.* at 473; see *id.* at 477 ("the statements seized were voluntarily committed to paper before the police arrived to search for them").

implicitly concedes that responsive records exist and that he possessed the records at the time of the subpoena's issuance. See *Doe I*, 465 U.S. at 614 n.13. His possession of the document, however, would not be apparent on the face of the records, and it could have evidentiary significance, for example, in proving the scienter element of a criminal offense. The act of production may also establish the authenticity of the relevant documents and thereby "relieve the Government of the need for authentication" at trial. *Ibid.* In addition, the producer's implicit representation that a particular document falls within the scope of a subpoena, see *Fisher*, 425 U.S. at 410, may assist the government or the trier of fact in interpreting a document that is ambiguous on its face. See Pet. App. 105a (Williams, J., dissenting). For Fifth Amendment purposes, the significance of the admissions implicit in the act of production is that they may reveal knowledge or mental impressions that—unlike the contents of the documents themselves—have not voluntarily been committed to writing.[5]

In both *Fisher* and *Doe I*, the question before the Court was whether a subpoena compelling the production of documents should be enforced over the recipient's claim of a Fifth Amendment privilege. In neither case had the subpoena recipient been granted use immunity pursuant to 18 U.S.C. 6002 and 6003. In each case the Court first considered, and rejected, the claim that a Fifth Amendment privilege attached to the contents of the documents. See *Fisher*, 425 U.S. at 407-410; *Doe I*, 465 U.S. at 610-612. The

[5] In that sense (and in that sense alone) the compelled production of documents pursuant to subpoena raises Fifth Amendment concerns that are not present when documents are acquired by search and seizure. Because "the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence," *Andresen*, 427 U.S. at 474, a search cannot elicit compelled admissions that go beyond the contents of the documents themselves.

Court then considered the question whether the subpoenas should nevertheless be quashed on the ground that the act of production could reasonably be expected to communicate incriminating information *over and above the information apparent from the documents themselves.*

In *Fisher*, the Court upheld enforcement of subpoenas that sought workpapers (see 425 U.S. at 394) prepared by accountants for two taxpayers and transferred to the taxpayers' lawyers. After rejecting the claim that incriminating contents could support a Fifth Amendment basis for resisting the compelled production of the workpapers, *id.* at 409-410, the Court stated that, in general, the act of production could have communicative aspects: "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control [by the subpoena recipient]," as well as indicating the recipient's "belief that the papers are those described in the subpoena." *Id.* at 410. On the facts of that case, however, the Court was "confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination." *Id.* at 410-411. The Court found it "doubtful" that admitting the existence and possession of the subpoenaed records even rose "to the level of testimony," since "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.* at 411.

In *Doe I*, by contrast, the Court, while holding that "the contents of [the subpoenaed] records are not privileged," 465 U.S. at 612, accepted the conclusion of the district court and court of appeals that "the act of producing the documents would involve testimonial self-incrimination." *Id.* at 613. The respondent in that case "did not concede in the District Court that the records listed in the subpoena actually

existed or were in his possession. [He] argued that by producing the records, he would tacitly admit their existence and his possession." *Id.* at 614 n.13. The respondent also contended that "[b]y producing the documents, [he] would relieve the Government of the need for authentication." *Ibid.* The Court found that "[t]hese allegations were sufficient to establish a valid claim of the privilege against self-incrimination." *Ibid.*

The Court also observed, however, that the government "could have compelled respondent to produce the documents listed in the subpoena" through a grant of use immunity, pursuant to 18 U.S.C. 6002 and 6003. 465 U.S. at 614, 615. The Court specifically rejected the respondent's contention that "any grant of use immunity must cover the contents of the documents as well as the act of production." *Id.* at 617 n.17. The Court explained:

> To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.

Ibid. (citations omitted). And in the concluding paragraph of its opinion, the Court reiterated its determination that the court of appeals had "erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment." *Id.* at 617. The Court explained that if that holding were allowed to stand, "respondent could argue on remand that any grant of use immunity must cover the contents of the records * * *. To avoid that result, we must reverse the decision below insofar as it held that the contents of the subpoenaed records are privileged." *Id.* at 617 n.18.

The Court in *Doe I* was not presented with, and did not discuss, what prohibitions would exist on the use of "information directly or indirectly derived" (18 U.S.C. 6002) from the immunized act of production. But the Court's explicit conclusion that the grant of immunity need not cover "the contents of the documents," 465 U.S. at 617 n.17, strongly suggests that the Court understood that the government would not be barred from using those contents in the investigation and prosecution of the case. Otherwise, the Court's extended discussion of why the contents of voluntarily prepared records are not privileged would have been largely beside the point.

C. The Contents Of Subpoenaed Documents Are Not Tainted Fruits Of The Act Of Production

1. The result in *Doe I* indicates that a grant of use immunity under 18 U.S.C. 6002 and 6003 enables the government to obtain and use the contents of potentially incriminating documents, while protecting a subpoena recipient against self-incrimination by any admissions that might be implicit in the act of production. Nothing in the *Doe I* opinion suggests that the contents of the documents might remain off limits as automatically tainted fruit of the testimonial aspects of the act of production. The court of appeals in this case nevertheless held that subpoenaed documents must themselves be treated as the tainted fruits of the act of production if the Independent Counsel cannot prove a "reasonably particular knowledge of [the] subpoenaed documents' actual existence, let alone their possession by the subpoenaed party," at the time the subpoena was issued. Pet. App. 71a. The court of appeals' holding would largely eliminate the practical utility of the use immunity statute in the act-of-production context. That is because the "reasonable particularity" standard that the court of appeals applied to the derivative use inquiry is indistinguishable from the standard the court fashioned for

addressing the antecedent question whether respondent's act of production had a significant testimonial component protected under the Fifth Amendment.[6] The court's holding thus virtually reduces to the proposition that whenever act-of-production immunity is needed, an order granting it will automatically make the contents of the subpoenaed documents tainted fruit.

Such a holding replicates, when act-of-production immunity is granted, the regime that existed under *Boyd* itself. Under *Boyd*, the use of incriminating documents that an individual was compelled to produce violated the Fifth Amendment, because the producing individual was regarded as in effect testifying through the contents of his private papers. In *Fisher* and *Doe I*, the Court rejected that proposition and held that the contents of voluntarily recorded documents are not themselves protected by the Fifth Amendment when requested by a subpoena. But the expansive concept of derivative use immunity adopted by the court of appeals in this case would (via a different route) put the government in essentially the same place that it occupied under *Boyd*: unable to use even the *contents* of voluntarily prepared records that it obtains under a grant of immunity.

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[6] In the court of appeals' view, the question "whether [respondent's] act of production had sufficient testimonial value to invoke the Fifth Amendment's protections," Pet. App. 61a, is to be resolved by asking whether the Independent Counsel can "demonstrat[e] with reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in [respondent's] possession," *id.* at 62a. In addressing the effect of use immunity under Section 6002, the court stated that "[i]f the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party." *Id.* at 71a.

Quite apart from its inconsistency with the thrust of the Court's cases culminating in *Doe I*, logic does not support the proposition that documents produced under act-of-production immunity should be regarded as information indirectly derived from the testimonial aspects of the act of production. "The prohibition of derivative use is an implementation of the 'link in the chain of evidence' theory for invocation of the [Fifth Amendment] privilege, pursuant to which the 'compelled testimony' need not itself be incriminating if it would lead to the discovery of incriminating evidence." *Doe II*, 487 U.S. at 208 n.6; see also *Kastigar*, 406 U.S. at 460-461. The delivery to the government of preexisting documents, however, is at its core a physical process by which the government acquires dominion and control over existing physical evidence. Put another way, a subpoena compels a physical process (delivery of documents) as well as implicit testimonial acts, and the requirement imposed through enforcement of the subpoena that the recipient undertake that physical process has a nontestimonial character that is not subject to the Fifth Amendment privilege. See pp. 13-16, *supra*. The government's possession of the documents is a fruit of that physical act, not of the implicit testimonial aspects of the act of production.

A grant of use immunity will, we recognize, preclude the government from using information derived from the testimonial and incriminating aspects of the act of production. The meaning of a document that, on its face, is indecipherable may be clarified by a subpoena recipient's implicit representation that it falls within a particular category of the subpoena. Or, the mere fact that a witness possesses a document may suggest that the witness had knowledge of its contents, and may therefore serve as an "investigatory lead." *Kastigar*, 406 U.S. at 460. In those examples, the government may be unable to make use of the document because it cannot divorce the document's contents from the information conveyed by the act of production. But the

constraints that exist in those situations follow from the government's need to make use of the testimonial aspects of the act of production *in addition to* the contents of the records in investigating the case. When there is no need to make use of those testimonial aspects, there is no barrier to the government's use of the non-testimonial aspects of the act of production, *i.e.*, the documents themselves and their contents.

This Court in *Muniz* recognized that a compelled communicative act may have testimonial and non-testimonial components, and that the Fifth Amendment forbids only the use of the act's testimonial aspects. The defendant in *Muniz* was arrested for drunken driving, transported to the station house, and asked a series of questions. 496 U.S. at 585-586. He was not advised that he had the right to remain silent. *Ibid.* The questioning was videotaped, and both the video and audio portions of the tape were introduced into evidence at Muniz's trial. *Id.* at 587.

While treating Muniz's answers as the product of "compulsion," the Court held that the videotape was admissible to demonstrate the slurred nature of Muniz's speech at the time of his arrest. 496 U.S. at 590. The Court explained:

> Under *Schmerber* and its progeny, * * * any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to [the officer's] direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio*, *supra*, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

Id. at 592. The Court held, however, that the Fifth Amendment barred the admission into evidence of one of Muniz's responses—his statement that he did not know the date of

his sixth birthday (see *id.* at 586)—because that answer "was incriminating, not just because of his delivery, but also because of his answer's *content*." *Id.* at 592.

Muniz makes clear that when an individual's conduct includes both testimonial and nontestimonial components, Fifth Amendment analysis requires precise identification of the aspect of that conduct that has been exploited by the government. In the present case, the court of appeals appears to have reasoned that if (a) a subpoena recipient's act of production has a significant testimonial component, and (b) the government acquires the relevant documents as a result of respondent's act of production, then (c) the documents themselves must be the fruit of compelled testimony. That conclusion simply does not follow. Even assuming the truth of propositions (a) and (b), the government acquires the documents through the purely physical— *i.e.*, non-testimonial—aspect of the recipient's act of production.[7]

2. In an article written before his appointment to the bench, Judge Samuel A. Alito, Jr., proposed an analytic model to resolve claims of Fifth Amendment act-of-production privilege in cases where documents have been obtained by subpoena after a grant of immunity under Sections 6002 and 6003. Under Judge Alito's approach, the

[7] In *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973), the Court held that a suspect in a criminal case had no Fifth Amendment right to refuse to provide a voice exemplar. The Court explained that "[t]he voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." *Id.* at 7. If a witness was compelled to answer substantive questions pursuant to a grant of use immunity under 18 U.S.C. 6002 and 6003, and his responses to the questions were tape-recorded, the Fifth Amendment surely would not preclude the use of the tape as a voice exemplar—*i.e.*, for its purely nontestimonial component. See *Doe I*, 465 U.S. at 617 n.17 ("To satisfy the requirements of the Fifth Amendment, a grant of immunity need only be as broad as the privilege against self-incrimination.").

grant of use immunity should place the government in the same position that it would occupy if the documents had "materializ[ed] in the grand jury room as if by magic before a subpoena has been issued"—*i.e.*, the position it would occupy if the government "ha[d] the records but [had] no idea where they came from and no information about the meaning of the records except what could be learned from the records themselves." Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 60 (1986). Judge Alito explained that "[t]his image is helpful because it allows us to separate the contents of the records from any evidence, direct or circumstantial, concerning their production." *Ibid.* That analysis is correct. Accord Pet. App. 111a (Williams, J., dissenting).

When the recipient of a subpoena provides documents pursuant to a grant of immunity under 18 U.S.C. 6002 and 6003, the use immunity conferred by Section 6002 covers only such *testimony* as is compelled by the subpoena, and information derived from that testimony. Insofar as a subpoena has the practical effect of requiring its recipient to communicate knowledge or mental impressions (*e.g.*, his prior possession of the document, or his belief that a document falls within a category described in the subpoena) that have not previously been reduced to writing, those communications should presumptively be regarded as compelled testimony.[8] Use immunity therefore precludes the government from drawing any inferences from the act of production that are not apparent from inspection of the documents. But

[8] If the government can establish that the substance of such implicit communications is a "foregone conclusion," then the implicit communications would not "rise[] to the level of testimony within the protection of the Fifth Amendment." *Fisher*, 425 U.S. at 411. We discuss, pp. 28-30, *infra*, why, under the approach of *Fisher*, implied admission of existence and possession of the nature of documents requested in this case should be seen as lacking sufficient testimonial value to acquire Fifth Amendment protection.

because the documents themselves were voluntarily created before the subpoena was issued, their acquisition and subsequent use by the government does not, in and of itself, involve or draw upon any form of compelled testimony.

The court of appeals believed that "the testimonial value of document production is high" in any case where "the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party," at the time the subpoena was issued. Pet. App. 70a-71a. That analysis misconceives the distinction between the testimonial and nontestimonial aspects of an act of production. Surrender of pre-existing physical evidence is not, in and of itself, a testimonial act, no matter how greatly the evidence contributes to the government's store of knowledge.[9] Rather, the testimonial significance of an act of production of documents depends upon the extent to which that act implicitly communicates mental impressions that have not previously been reduced to writing. Requiring the government to treat sub-

[9] In *Bouknight*, for example, the Court considered the propriety of a court order directing a mother to produce her child for inspection by juvenile authorities. The court that issued the order plainly contemplated that compliance would increase the government's store of knowledge: the basis for the order was that substantial uncertainty existed regarding the child's condition. See 493 U.S. at 552-553. This Court nevertheless stated categorically that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded. * * * Bouknight therefore cannot claim the privilege based upon anything that examination of [the child] might reveal." *Id.* at 555. The "existence" of the child was not in issue in *Bouknight*, *ibid.*, and the Court did reserve judgment on the question whether "limitations * * * may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." *Id.* at 561. But the Court clearly envisioned that the child himself, and his physical condition, would not be swept in by possible limitations on the use of the mother's "implicit communication of control over [the child] at the moment of production." *Id.* at 555.

poenaed documents as though they had been acquired "unsolicited and unmarked," *id.* at 111a (Williams, J., dissenting), is therefore an appropriate means of ensuring that a subpoena recipient is not incriminated by the testimonial aspect of his compelled act of production.

3. The court of appeals found that subpoenaed documents are the tainted fruit of a subpoena recipient's admission, implicit in the act of production, that the documents he produced existed. See, *e.g.*, Pet. App. 56a-57a n.33 ("Where the government had no information as to [a document's] potential existence prior to the compelled response, its *a posteriori* knowledge is inextricably linked with the communicative testimony inherent in the subpoena response."). As the preceding analysis indicates, that conclusion is wrong for two related reasons.

a. This Court has recognized that "[c]ompliance with [a] subpoena tacitly concedes *the existence of the papers demanded*." *Fisher*, 425 U.S. at 410 (emphasis added).[10] As the dissenting judge in the court of appeals explained (Pet. App. 105a), the underscored language refers to the subpoena recipient's implicit admission that there exist documents responsive to the subpoena. Indeed, it is difficult to understand how a subpoena recipient could assert that "documents exist" apart from an implicit comment that the documents in question are responsive to the subpoena. Subpoenas do not require production of "documents" in the abstract, but designate documents by description or categories. The only meaningful statement of "existence" that can be inferred from the act of production is that *responsive* documents exist, and only that representation "has communicative

[10] The Court in *Doe I* similarly observed that "[r]espondent did not concede in the District Court that the records listed in the subpoena actually existed or were in his possession. Respondent argued that by producing the records, he would tacitly admit their existence and his possession." 465 U.S. at 614 n.13.

aspects of its own, *wholly aside from the contents of the papers produced.*" *Fisher*, 425 U.S. at 410 (emphasis added).

That a document falls within a category described in the subpoena will not always be discernible from examination of the document's contents. The implicit statement that "responsive documents exist" may therefore convey information "aside from the contents of the papers produced," *i.e.*, in elucidating that a particular document is related to a transaction identified in a category of the subpoena. See Pet. App. 105a (Williams, J., dissenting). And because that information has not voluntarily been committed to writing, its compelled disclosure is a matter of Fifth Amendment concern. By contrast, no information distinct from the documents' contents is communicated by the statement that "the produced documents exist."

b. Even if the statement that "the produced documents exist" were a meaningful testimonial component of the act of production, the government's possession of the contents of the documents is not "derived from" (18 U.S.C. 6002) that testimonial admission. It is instead the result of the act of production *qua* physical act. Because that physical act is "a legitimate independent source[]" (*Kastigar*, 406 U.S. at 462) of the information contained within the documents, respondent's immunity under Section 6002 does not preclude the government from using the documents' contents for investigative and evidentiary purposes, so long as it can do so without resorting to the testimonial and incriminating aspects of the act of production to interpret the contents or to furnish an investigatory lead.

D. The Existence Of Ordinary Business And Financial Records Is Generally A Foregone Conclusion

Even if the court of appeals were correct in holding that a subpoena recipient's act of producing documents is testimonial insofar it reveals the existence of documents, the court erred in requiring the government to demonstrate

prior knowledge of *particular* business and financial records. In *Fisher*, this Court found it "doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment." 425 U.S. at 411. The Court observed that the documents sought—accountant's workpapers—were "the kind usually prepared by an accountant working on the tax returns of his client." *Ibid.* It concluded that

> [t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender."

Ibid. (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

In finding that the "existence and location" of the subpoenaed documents were a "foregone conclusion," the Court in *Fisher* did not require the government to establish its knowledge of the individual documents sought by the subpoena. Nor, contrary to the court of appeals' conclusion (see Pet. App. 33a-34a), did it find that the government "had highly specific knowledge as to the existence" of the subpoenaed documents. The Court relied instead on the general nature of the subpoenaed documents, noting that they were "the kind usually prepared by an accountant working on the tax returns of his client." 425 U.S. at 411.

Thus, *Fisher*'s "foregone conclusion" test focuses on broader categories of documents, and not on the individual documents that may fall within the specifications of a subpoena. As applied to an individual who is or was engaged in business, the test would therefore defeat any effort to invoke the Fifth Amendment to resist compliance with a subpoena for ordinary business records, such as ledgers,

bank records, invoices, receipts, and bills.[11] Such documents are kept by every business, and conceding their existence therefore "adds little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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[11] See Sara S. Beale, William C. Bryson, et al., *Grand Jury Law and Practice* § 6:15, at 6-113 (2d ed. 1997) ("a subpoena for a sole proprietor's bank account records could hardly raise serious questions about the existence of the records and the sole proprietor's possession of them"); see also *United States* v. *Stone*, 976 F.2d 909, 911 (4th Cir. 1992) (foregone conclusion that witness would possess rental documents and utility and telephone bills for beach house), cert. denied, 507 U.S. 1029 (1993); *United States* v. *Fishman*, 726 F.2d 125, 127 & n.4 (4th Cir. 1983) (doctor's possession and control of business records is a "self-evident truth[]"). This Court in *Doe I* did affirm the finding of the court of appeals in that case that a subpoena calling for business records generally like the sort of financial and business records sought in this case triggered a protected act of production, and that the government had not satisfied the "foregone conclusion" test. *Doe I*, 465 U.S. at 614 n.13. The Court, however, relied primarily on its reluctance "to disturb findings of fact in which two courts below have concurred," *id.* at 614, and did not independently examine the question. *Doe I* therefore should not be read to retreat from the analysis of *Fisher*.

APPENDIX

18 U.S.C. 6002 provides as follows:

Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6003 provides as follows:

Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or

may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.